

The Right to Health: Discriminatory Treatment against Migrant Workers in Malaysia

(Hak terhadap Kesihatan bagi Pekerja Migran di Malaysia)

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ABSTRACT

Due to globalization, migration has become a worldwide trend, and now poses a new challenge to countries that receive and send migrant workers. Many issues have arisen from this trend, especially in terms of the rights of the migrant workers. Malaysia is one of those countries that receive migrant workers, with 6.7 million migrants working in Malaysia, comprising of both with legal and illegal status. Without a doubt, Malaysia is a receiving country which depends a lot on migrant workers in boosting her productivity, especially in the economic and development sectors. Migrant workers in Malaysia are required to be covered by a health insurance scheme, particularly for compensation in the event of an accident. The question is whether the right of migrant workers to access healthcare in Malaysia is protected adequately without burdening the government, particularly in terms of the cost? Has the practice in Malaysia fulfil the right to health of migrant workers? Therefore, this article aims at analysing the laws and related instruments governing the issue of right to health of migrant workers in Malaysia. The methodology used theoretical analysis and interviews of identified target groups in order to obtain the primary. The interim analysis demonstrates that the existing policies and legal framework in Malaysia are practising discriminatory treatment against migrant workers in terms of access to healthcare and social benefits.

Keywords: Migrant workers; Malaysia; healthcare; right to health; human rights; International Law

ABSTRAK

Kepesatan era globalisasi pada masa kini telah memberikan kesan secara langsung kepada amalan migrasi yang telah menjadi fenomena di serata dunia. Kesan langsung ini menjadi suatu cabaran terkini kepada negara-negara pengeluar dan penerima pekerja asing. Pelbagai isu telah timbul rentetan daripada fenomena ini terutamanya isu terhadap hak pekerja asing itu sendiri. Malaysia merupakan salah satu negara penerima yang menerima pekerja asing dengan anggaran berjumlah 6.7 juta yang bekerja di Malaysia merangkumi status sah dan tidak sah di sisi undang-undang. Adalah tidak dapat disangkal bahawa Malaysia merupakan negara penerima pekerja asing dengan tahap kebergantungan yang tinggi kepada permintaan pekerja asing bagi meningkatkan kelestarian produktiviti terutamanya dalam sektor pembangunan dan ekonomi. Setiap pekerja asing yang bekerja di Malaysia hendaklah dilindungi dengan skim insurans kesihatan yang dilaksanakan oleh kerajaan Malaysia terutamanya skim pampasan sekiranya berlaku kemalangan dalam tempoh pekerjaan. Persoalannya di sini adalah sama ada hak pekerja asing terhadap kesihatan menerima perlindungan yang mencukupi dengan tidak menyumbang kepada bebanan kerajaan Malaysia terhadap kos utamanya. Adakah amalan di Malaysia telah memenuhi perlindungan pekerja asing terhadap hak kepada kesihatan? Artikel ini bertujuan untuk menganalisis undang-undang dan juga instrumen antarabangsa berkaitan hak terhadap kesihatan pekerja asing di Malaysia. Metodologi yang diguna pakai dalam artikel ini adalah analisis teori dan temu bual kumpulan yang telah dikenal pasti sebagai data utama kupasan lanjut artikel ini. Analisis interim menunjukkan bahawa polisi dan kerangka perundangan sedia ada di Malaysia adalah bersifat mendiskriminasi pekerja asing terhadap hak kesihatan dan kepentingan sosial.

Kata kunci: Pekerja asing; Malaysia; servis kesihatan; hak terhadap kesihatan; hak asasi manusia; undang-undang antarabangsa

INTRODUCTION

Every State should guarantee the enjoyment of the right to health of its population in order to be a developed nation. Thus, most States give the highest priority to health. Securing health is important to the well-being of humans. There are various international instruments that

recognise the right to health of every person, including migrant workers. They are the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) 1990 and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007. It has now been revealed by the World Health Organisation (WHO) that at least one

of these international instruments has been adopted by every State in the world. It is the obligation of the State to maintain the sovereignty of a nation, but the State is also obliged to ensure the social security and welfare of everyone within its territory, including migrant workers. According to the Committee on Economic, Social and Cultural Rights, United Nations Human Rights Office of the High Commissioner, the definition of the right to health is ‘an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information.’ Therefore, this article aims at examining the various international legal instruments that are relevant to the protection of the right to health. This article further examines how the relevant international legal provisions are being implemented in Malaysia. The right to health as a human right has always been embodied within the right to life.¹ Unfortunately, the right to health has been neglected by many States, including Malaysia, especially when it comes to the right to health of migrant workers. This article intends to initiate a discussion about the right to access healthcare as a human right, particularly for migrant workers in Malaysia. It consists of three main parts. The first part discusses the provisions relating to the right to health in different international legal instruments. The second part analyses the Malaysian laws on the right of migrant workers to health, and the health issues in Malaysia. The final part discusses the practices of the Malaysian government and the healthcare sector in handling the issue of health as a human right at the national level.

RIGHT TO HEALTH UNDER INTERNATIONAL LAW

The Universal Declaration of Human Rights (UDHR) 1948 is one of the main instruments governing issues concerning human rights. The right to health is guaranteed under Article 25, which provides that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food, clothing, and medical care.’ The International Covenant on Economic, Social and Cultural Rights (ICESCR)² 1966 provides in Article 12 that ‘the States being Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’ This provision further provides that ‘in doing so, the State Parties shall take necessary steps to ensure the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; to improve all aspects of environmental and industrial hygiene; to prevent, treat and control epidemic, endemic, occupational and other diseases; and create conditions which would assure to all medical service and medical

attention in the event of sickness.’ The Universal Declaration on the Human Genome and Human Rights of 1997 contains similar provisions relating to health.³ It can be seen that the standard of living is linked to health under Article 25 of the UDHR. These international human rights instruments apply to migrant workers thus, making them as beneficiaries of the rights as *erga omnes* as human rights principle.⁴ Most of the instruments deal with physical health, while the ICESCR includes both physical and mental health.⁵ Meanwhile, the International Covenant on Civil and Political Right (ICCPR) describes that right in terms of the highest standard of health attainable.

In the European region, Part I of the European Social Charter of 1961 provides that ‘everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.’⁶ Article 12 of Part II of the European Social Charter of 1961 deals with the right to health and provides that ‘with a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

1. To remove the causes of ill-health as far as possible.
2. To provide individual responsibility in matters of health, with advisory and educational facilities for the promotion and encouragement of health.
3. To avoid, as far as possible, epidemic, endemic and other diseases.

The American Declaration of the Rights and Duties of Man 1948 provides that ‘every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.’⁷ Meanwhile, the African Charter on Human and Peoples’ Rights also imposes an obligation on State Parties to take necessary actions to protect the health of the people by ensuring that when they are sick they will receive medical attention. Article 16 of the African Charter on Human and Peoples’ Rights 1981 provides that ‘... ‘every individual shall have the right to enjoy the best attainable state of physical and mental health.’” Further, it is forbidden to conduct medical or scientific investigations on any person without free consent pursuant to Article 13 of the Arab Charter on Human Rights 1994, and Article 3 of the Commonwealth of Independent States Convention on Human Rights 2000. Malaysia is a Member State of ASEAN, and it is provided under Article 29(1) of the ASEAN Human Rights Declaration (AHRD) that “‘Every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable healthcare services, and to have access to medical facilities.’”

Meanwhile, in the specific context of migrant workers, the main international legal instrument that

protects the rights of migrant workers is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICRMW). There are several provisions⁸ under this Convention that are directly linked to the right to health of migrant workers, while several provisions⁹ linked to the fulfilment of the right to health of migrant workers indirectly. Article 25 of the ICRMW provides that migrant workers shall enjoy treatment that is no less favourable than that which is applied to nationals. Migrant workers shall have the right to receive treatment in urgent situations that may harm their health on the basis of equal treatment under Article 28. Article 43 of the ICRMW clearly provides that migrant workers shall have the right to access health services from the State of employment, while Article 45 of the ICRMW provides that the same right is applicable to the members of the families of migrant workers. The standard of health that shall be received by migrant workers must be no less favourable than that which is applied to nationals in such a way as to ensure that it meets the standards with respect to the right to health and the principles of human dignity and non-discrimination.

The ASEAN Member States have also declared their concern for the rights of migrant workers in the Southeast Asian region, as stated in the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, which was adopted on 13 January 2007 in Cebu, Philippines.¹⁰ This instrument protects the rights of migrant workers by imposing certain obligations on the sending and receiving countries. There is no specific provision under this Declaration that clearly states the right to health of migrant workers. The right to health of migrant workers might be protected indirectly, for example, through the right to promote social welfare,¹¹ to protect fundamental human rights,¹² to uphold the dignity of migrant workers,¹³ and adequate access to decent working and living conditions.¹⁴ This declaration focuses on the obligations of the receiving and sending States, without any concern for the shared obligations of all Member States within the region itself. This declaration also focuses on regular migrant workers and emphasises on a harmonious ASEAN Community.¹⁵

The ILO is an international organisation that focuses on labour issues. Malaysia is a member of the organisation. 18 of ILO conventions been ratified and signed by the Malaysian government which 17 out of 18 conventions are in force and 1 has been denounced.¹⁶ However, Malaysia has not signed and ratified ICRMW, which is the core instrument enacted by the United Nations (UN) for the promotion and protection of the human rights of migrant workers. Several conventions have been adopted by the ILO in ensuring the health and occupational safety of workers (ILO 2015). These conventions are as follows: the Convention on Medical Examination of Young Persons (Industry) 1946 (Convention No. 77); the Convention on Medical Examination of Young Persons (Non-Industrial Occupations) 1946 (Convention No. 78); the Convention on Employment Injury Benefits 1964 (Convention No.

121); the Convention on Medical Examination of Young Persons (Underground Work) 1965 (Convention No. 124); the Convention on Occupational Health Services 1985 (Convention No. 161); the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (Convention No. 182); and the Convention on Maternity Protection 2000 (Convention No. 183).

There is also another ILO instrument crucial to migrant workers, namely the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998. This instrument is to enhance Member States' commitment to respect and promote principles and rights in four categories, whether or not they have ratified the relevant ILO Conventions. The four categories are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. The ILO Declaration particularly mentions groups with special needs, including the unemployed and migrant workers. This commitment is supported by a follow-up procedure that obliges Member States that have not ratified one or more of the core related conventions to report each year on the status of the relevant rights and principles within their borders, noting impediments to ratification, and areas where assistance may be required. The observations are considered by the ILO as the governing body. Although, this Declaration does not directly protect the right to health of migrant workers, but there is one principle that is indirectly related to the right to health, which falls under one of the four categories of fundamental rights at work, namely the elimination of discrimination in respect of employment and occupation.

The ILO also provides instruments that protect the right to social security, which includes the right to health under the Social Security (Minimum Standards) Convention, 1952 (No. 102). Malaysia is not among the 53 Member States that ratified this Convention, which concerns the minimum standards that should be provided by the States to workers regardless of the nationality of the workers. Part II of this Convention, starting from Article 7 to Article 12, provides for the right to medical care, while Part XII is in relation to Equality of Treatment of Non-National Residents. This Convention is the main convention that protects the right to health, with direct regard to medical care, employment injuries, sickness benefits and equal treatment.

RIGHT TO HEALTH FOR MIGRANT WORKERS IN MALAYSIA

RIGHT TO HEALTH UNDER FEDERAL CONSTITUTION

The right to health in Malaysia is protected indirectly under the Federal Constitution of Malaysia. This issue

is covered by the Federal Constitution in general in relation to public health, with no in-depth focus on specific groups. Articles 5 to 13 in Part 2 of the Federal Constitution deliberate on the fundamental rights of citizens and non-citizens. Article 5(1) provides that “No person shall be deprived of his life or personal liberty, save in accordance with the law.” Arguably, this provision includes the right to health. This part is concerned with those rights that are judicially enforceable, subject to such restrictions as mentioned in those provisions. The person who is a victim may make a claim before the High Court if any of these rights are violated.¹⁷ According to Article 9 of the Federal Constitution, the freedom of movement of a Malaysian citizen can be restricted by enactment of the law if he is considered by the government to be a threat to public health.

Article 11 of the Federal Constitution ensures the right to religious freedom, but this freedom cannot be exercised by ignoring public health. Any person can be disqualified from being a member of the House of Parliament if he is declared to be of unsound mind under Article 48 of the Federal Constitution of Malaysia. Article 119 of the Federal Constitution also deliberates that a person is disqualified from being a voter in any election to the House of Representatives of the Legislative Assembly if he is declared to be a person of unsound mind on the qualifying date. Additionally, Article 125 of the Federal Constitution specifies that a judge of the Federal Court can be removed in case of infirmity of body or mind. A tribunal shall be appointed by the Yang di-Pertuan Agong, and by referring the representation to it, the judge can be removed from his office on the recommendation of the tribunal.¹⁸

The enlightened discussion shows the importance of health issues. This shows that the right to health is indirectly protected and recognised by Malaysian laws but the issue that might be raised here is whether the right to health in Malaysia is regarding entitlement of right to health on the ground of public health or only focused on specific group, such as migrant workers. This is because, there is no such provision under the Federal Constitution that provides for the right to health of migrant workers. It appears that the right to health of migrant workers in Malaysia is protected in general under the capacity as a person living in Malaysia. Furthermore, another concern is on accessibility of health care services including access to emergency treatment and healthcare services at government hospitals, by migrant workers.

HEALTH RELATED LEGISLATIONS IN MALAYSIA

Since Malaysia gained independence in 1957, the government has passed many laws regarding health issues. These laws were enacted to serve multiple purposes, namely to make people aware of different diseases, to set up medical institutions, and to manage the human resources involved in the health sector. Having

many laws that concerned with public health, Malaysia arguably could be said as committed to protecting the right to health. The legislations that provide for the right to health in Malaysia are the Penal Code; the Criminal Procedure Code (Act No. 593); the Local Government Act 1974 (Act No. 171); and the Town and Country Planning Act (Act No. 172 of 1976) which contain provisions with elaborations on the right to health. Section 13(1) of the Food Act 1983 (Act No. 281 of 1983) provides that any person shall be liable for selling or preparing food with poisonous ingredients that may harm and cause injury. Through a Legislative Supplement P.U. (A) 324/2004 Control of Tobacco Product Regulations 2004 under the the Food Act 1983 discusses many issues in particular the protection of health that Tobacco products cannot be sold to any person who is under the age of 16 years.

The Prevention and Control of Infectious Diseases Act (Act No. 342 of 1988) provides that an authorised officer is governed by this Act to medically examine any vehicle, person and animal at any time upon its arrival in Malaysia. The Hydrogen Cyanide Act 1953 (Ordinance No. 22 of 1953) (Act 260) (Revised 1981) states in section 4 that the Minister concerned should be informed of any accident which occasions the loss of human life or personal injury. The Environmental Quality Act (Act No. 127 of 1974); Protection of Public Health Ordinance 1999; Medical Act (Act No. 50 of 1971); Human Tissues Act (Act No. 130 of 1974); Telemedicine Act (Act No. 564 of 1997); Child Act (Act No. 611 of 2001); and the Mental Health Act (Act No. 615 of 2001) also provide for the protection of public health.

What can be observed about the above laws is that the government of Malaysia does protect the right to health by regulating certain activities that may have effect on public health in general. At the same time, all these laws only touch the surface of the right to health, especially in relation to public health. There are no laws or regulations in Malaysia that specifically concerned with and specifically protecting the right to health of migrant workers.

In terms of charges for medical treatment, one law that has been enacted and gazetted by the Federal Government of Malaysia is the Fees (Medical) (Cost of Services) Order 2014. This law regulates the charges for medical treatment provided to foreigners in Malaysia. According to the order, the charges increased yearly from 2015-2018. According to this Order, only at the beginning of 2018, foreigners will have to pay for the actual cost (100%) for his/her medical treatment in Malaysia. However, a *Surat Pekeliling Ketua Setiausaha Bilangan 8* was issued by the Ministry of Health Malaysia announcing that starting from 1st January 2016 foreigners, including migrant workers will be charged in full for their medical and hospital treatment.¹⁹ This circular has been implemented by the Ministry of Health since 1st January 2016 and the main objective of this circular is to impose full charges to all foreigners regardless of

their status as migrant workers or not. This circular is currently being implemented by all public hospitals under the administration of Ministry of Health while the full charge supposedly imposed on foreigners in 2018 in accordance with the Fees (Medical) (Cost of Services) Order 2014. However, due to the announcement made by *Surat Pekeliling Ketua Setiausaha Bilangan 8* Ministry of Health 2015 (issued after the presentation of Malaysian 2016 Budget on 23rd October 2015), full charge has been implemented on foreigners 2 years earlier i.e. on 1st January 2016.

ACCESS TO HEALTHCARE AND ENJOYMENT OF THE RIGHT TO HEALTH BY MIGRANT WORKERS IN MALAYSIA

In 2011, the Working Group on Arbitrary Detention (WGAD) reported that migrants in Malaysia were not being treated in accordance with the standards set by international laws on human rights.²⁰ According to the report, migrants were abused mostly under the detention of Malaysian Authority with inadequate medical care in most immigration detention centres.²¹

The Hospitalisation and Surgical Scheme for Migrants Workers, known as 'SPIKPA' Foreign Worker's Health Insurance Protection Scheme (SPIKPA), was implemented in Malaysia in 2011. SPIKPA is a private medical coverage scheme and is mandatory for all migrant workers. It is enforced by the Ministry of Health under which all migrant workers are required to be under insurance scheme provided by 28 Ministry's approved insurance providers,²² by paying a premium of RM120 for a total

coverage of RM10,000 for medical and Hospitalisation charges.²³ The premium is to be paid by the employer or worker, as mutually agreed to by them, and this scheme is mandated for all sectors, except for domestic workers and plantation workers.²⁴ It was estimated that 1.2 to 1.4 million out of 1.8 million registered migrant workers were covered by this compulsory scheme at the end of 2011.²⁵ This health insurance coverage for migrant workers is introduced as an additional initiative to the existing scheme under the Workmen's Compensation Act (WCA) 1952.

WCA 1952 provides for compensation payment and hospitalisation coverage for foreign workers under a scheme called 'Foreign Workers Compensation Scheme (FWCS).' This scheme requires payment of a lump sum compensation in the event of death or disability of a migrant worker. It also stipulates regulations on the payment of medical costs by employers. The maximum compensation that can be given to a migrant worker amounts to RM23,000, which is rarely sufficient to cover a case of permanent disablement.²⁶ These are the two schemes that are provided by the government of Malaysia for migrant workers to obtain treatment and to access healthcare services. The problem with these two schemes has to do with the coverage because the hospital and medical charges incurred by the migrant workers are often higher than the coverage that they entitled under the abovesaid schemes and this will lead to the next treatment being inaccessible to the workers. The table below shows the features of the compensation and Hospitalisation schemes provided for migrant workers by the government of Malaysia.

TABLE 1. Compensation Scheme and Hospitalisation under the Foreign Workers Compensation Scheme (FWCS) and the Hospitalisation and Personal Accident Insurance Scheme (SPIKPA)

| Coverage | Foreign Workers Compensation Scheme for Work Injuries, Malaysia (FWCS) | | Hospitalisation and Personal Accident Insurance Scheme for Foreign Workers and Foreign Domestic Workers, Malaysia (SPIKPA) |
|--|--|---|--|
| Death | Death from occupational disease or accident during working hours | RM18,000.00 with an extra sum of RM7,000.00. | None |
| Total Permanent Incapacity | Permanent Total Disablement | RM23,000.00 | None |
| Medical Expenses | Temporary Disablement | RM165.00 or 1/3 of monthly salary | None |
| Hospitalisation | None | | RM10,000.00 under SPIKPA; excluding Foreign Domestic Workers and Plantation workers |
| Personal Accident Insurance (Off-Work Hours) | Death | RM23,000.00 | None |
| | Permanent Total Disablement | RM23,000.00 | |
| | Permanent Partial Disablement | RM23,000.00 | |
| | Temporary Disablement | Sum of money calculated in accordance to Section 8(e) of WCA 1952 | |
| | Medical Expenses | Maximum to RM750.00 | |

Source: Workmen's Compensation Act 1952, and *Skim Perlindungan Insurans Kesihatan Pekerja Asing 2011*, Ministry of Health

In order to assess equal benefit between migrant workers and local workers in Malaysia, relevant legislation has to be further scrutinised. The Social Security Organisation (SOCSO), which is governed by the Employees Social Security Act 1969, only covers local workers who are Malaysian citizens. It protects local workers' right to social security and other related health benefits as provided by SOCSO Schemes, generally

(Employment Injury Scheme, Invalidity Scheme and Self-Employed Employment Injury Scheme). These schemes provide insurance for any job-related injuries or disabilities, such as injuries during working hours.²⁷ How much compensation do Malaysian workers get for death, permanent disability and temporary disability due to job-related injuries as compared to migrant workers is shown in the following Table 2.

TABLE 2. Compensation, protection & hospitalisation schemes for foreign workers as in comparison with local workers

| Coverage | Foreign Workers Compensation Scheme for Work Injuries, Malaysia (FWCS) | | SOC SO Protection Schemes for Local Workers |
|--|--|---|---|
| Death | Death from occupational disease or accident during working hours | RM18,000.00 with an extra sum of RM7,000.00. | Refer to column of Dependant's Benefits |
| Total Permanent Incapacity | Permanent Total Disablement | RM23,000.00 | Daily rate for Permanent Disablement Benefit is based on 90% of assumed average daily wage of the insured person |
| Medical Expenses | Temporary Disablement | RM165.00 or 1/3 of monthly salary | <ol style="list-style-type: none"> 1. Temporary Disablement Benefit is paid for the period the employee is on medical leave certified by a doctor 2. Payment rate is equivalent to 80% of the assumed average daily wage of the insured person |
| Hospitalisation/ Medical Benefits | None | | <ol style="list-style-type: none"> 1. Free Medical treatment at SOCSO Panel Clinics/ Government Hospitals until fully recovered 2. Reimbursement of Medical Claims for non SOCSO's panel clinics 3. Employee is eligible for second class ward treatment. Specialist treatment will be provided, if required. |
| Personal Accident Insurance (Off-Work Hours) | Death | RM23,000.00 | SOC SO Protection schemes only covers for work-related cases happened during the course of employment. |
| | Permanent Total Disablement | RM23,000.00 | |
| | Permanent Partial Disablement | RM23,000.00 | Etc. travelling to work place, emergency and disease caused by the occupation. |
| | Temporary Disablement | Sum of money calculated in accordance to section 8(e) of WCA 1952 | |
| | Medical Expenses | Maximum to RM750.00 | |
| | Refer to Order 4. Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2004 | | |
| Constance-Attendance Allowance | None | | <p>The allowance is equivalent to 40% of the rate of permanent total disablement benefit subject to maximum of RM500 per month</p> <p>Physical Rehabilitation</p> <ol style="list-style-type: none"> 1. Return to Work programme 2. Occupational therapy 3. Reconstructive surgery 4. Artificial limbs and prosthetics 5. Orthopaedic aids 6. Return to Work Programme 7. Physiotherapy <p>Vocational Rehabilitation</p> <ol style="list-style-type: none"> 1. Training in selected areas such as electrical wiring, sewing, radio/TV repair, air conditioner and fridge repair, plumbing, stenography, secretarial skills and others. 2. Return to Work programme |
| Facilities for Physical/ Vocational Rehabilitation | None | | |
| Return to Work Programme | None | | <ol style="list-style-type: none"> 1. Provide appropriate rehabilitative equipment's including orthotic, prosthetic, implants and so forth, based on the prescription given by the treating doctors or specialists 2. Promotes speedy recovery and reduces the impact on the quality of life due to the disability or illness |
| Dependants' Benefit | Only in the event of Death on lump sum basis with maximum of RM25,000 | | <p>Daily rate for Dependants Benefit is based on 90% of assumed average daily wage of the insured person</p> <ol style="list-style-type: none"> 1. Widow/Widower: 3/5 2. Child: 2/5 Receives benefit up to age 21 or marriage (whichever occurs earlier) <p>If there are no widow, widower or child, the share of the pay-out is as follows:</p> <ol style="list-style-type: none"> 1. Parents: 4/10 Receives benefit for life 2. Brothers/Sisters: 3/10 Receives benefit up to age 21 or marriage (whichever occurs earlier) 3. Grandparents (in the case of the Insured Person's parents are deceased): 4/10 Receives benefit for life |
| Funeral Benefit | Up to RM1,000.00 if the deceased worker has no dependants | | Amount paid will be the actual amount incurred or RM1,500 whichever is lower |
| Education Benefit | None | | Education Benefit is a SOCSO benefit that can come in the form of education benefits or scholarships to dependent beneficiaries based on PERKESO's Benefits Schedule |

Source: Workmen's Compensation Act 1952, and Social Security Organisation of Malaysia.

Migrant workers used to get the same protection as Malaysian workers under SOCSO Schemes before they were excluded with effect from 1st April 1993.²⁸ They were excluded from SOCSO membership due to the principle of 'once in – always in' adopted by SOCSO. This is on the stand that migrant workers come and reside in Malaysia temporarily based on working permit. The government also view that it is not feasible to insure migrant workers through the coverage and protection provided by SOCSO Schemes. This is because payments of compensation made in the event of accident and disabilities under SOCSO Schemes are on monthly basis to workers who normally sent back to country of origins after accident or disablement. Thus, it is impractical although not impossible for SOCSO to manage payments to workers living outside Malaysia. According to Shamsuddin Bardan,²⁹ there were cases where claims were made by the workers' dependants even after the death of the workers. Thus, migrant workers are insured under Workmen Compensation Act 1952 where payment is made on lump sum basis which is more practical rather than monthly payments made by the government.³⁰ The relevant agency was also of the view that it is better for all aspects on migrant workers to be regulated by a single legislation *vis-à-vis* the Workmen Compensation Act 1952 (WCA 1952).³¹

Another scheme that is provided by the Malaysian government for local workers is the Employees' Provident Fund (EPF), which requires monthly contributions from Malaysian workers and their respective employers. EPF Scheme also provides a certain allocation from EPF savings for medical care. Unfortunately, EPF Scheme is not available for migrant workers in Malaysia. The schemes provided by the Malaysian government for local workers and migrant workers seem to be unbalanced, especially with regard to the coverage in the event of death and compensation for injury. As reflected in Table 2 above, unlike migrant workers, compensation for local workers are not subjected to fixed amount as they will be compensated based on a percentage of their salary. This shows that migrant workers are subjected to unequal treatment under the Malaysian laws when local workers get better coverage.

According to Karupiah Somasundram,³³ government decision to exclude migrant workers from SOCSO Scheme has been heavily criticised by several parties who involved in dealing and managing migrant workers including the Malaysian Employers Federation, Trade Union Congress and other stakeholders. The critics centred on inadequacy of protection provided by Malaysian legislation and discriminatory treatment towards migrant workers and unequal entitlement of social security standards according to labour and human rights instruments.³⁴ The Malaysian Trade Union Congress contended that the exclusion of migrant workers from SOCSO Scheme was also due to heavy commitment on the part of the government to compensate migrant workers since work

injuries among migrant workers are higher compared to local workers.³⁵ If the government were to provide equal treatment between migrant workers and local workers, the government will eventually be spending more money on migrant workers instead of local workers.

In terms of charges for medical treatment at government hospital, local workers have to pay RM1 for each consultation with a medical practitioner at the hospital and RM5 for each consultation with a specialist, whereas foreigners, including migrant workers, are charged a minimum deposit of RM400 for third class wards admission and RM800 for surgical cases, as regulated by the Ministry of Health.³⁶ Meanwhile, the medical charges for a migrant worker's medical examination and treatment in case of accident shall be borne by the employer, as specified under the WCA (section 15(3), WCA 1952). In practice, some migrant workers are left with excessive bills that they are unable to pay, and this has really burdened the public hospitals under the administration of the Ministry of Health. In order to have access to public health services, migrant workers are required to have a medical card for registration or payment in cash, in lieu of a medical card. Migrant workers with medical insurance have to provide the medical card to proof that they are being insured.

The registration process at most public hospitals requires patients to provide a medical card and if there is no card shown they have to pay the deposit by cash at the admission. If the hospital bill is exceeding the insurance coverage, the remaining balance has to be paid by them which is most of the time beyond their financial capability. However, in practice, the passports and medical cards of the migrant workers are kept by the employers, thus making it difficult for them to get treatment.³⁷ Arguably, public hospitals cannot reject any emergency cases needing medical treatment, even if patients are unable to pay or uninsured. This is in accordance to the general human rights principle. Teaching hospitals benefit most from this policy as they will have sufficient medical cases for medical students. In general, the hospital will accept and provides basic treatment to uninsured migrant workers and resulted in unpaid hospital bills.³⁸

The practice at private hospital is different in which local and foreign patients will be treated equally. Regardless of the patient's status as Malaysian or foreigners, if he or she is needing for treatment for sickness or injury at private hospitals, a medical card is required. If patients do not have a medical card or are not covered by insurance, the private hospital concerned can refuse treatment to them. At the registration counter, the private hospital will proceed with treatment after they have contacted the insurance panel to seek payment or a guarantee letter to ensure that the patient has coverage is produced.³⁹ In principle, this policy is not in violation of the right of migrant workers to health since it is a private hospital. Migrant workers do not have any option for obtaining treatment either in a public or

private hospital. This situation is due to the fact that the Malaysian government requires migrant workers to pay at a higher rate as compared to local workers. This is despite the fact that migrant workers are also paying the highest amount of tax through work levy charges. Since they have to pay tax through levy chargers in getting working permit, it was argued by Malaysian Bar for the government to provide migrant workers with higher or greater protection compared to what is provided by the government currently.⁴⁰

Under the current legal framework, many migrant workers are unable to afford the payment for accessing healthcare services in Malaysia.⁴¹ This approach is in violation of the right to health as a human right.⁴² This is apparent when non-citizens encounter discrimination while accessing health services because as foreigners, they are required to pay higher rates for medical treatment at government hospitals. Illegal foreign workers are also afraid to seek medical treatment for fear of being arrested.⁴³ Malaysia does not have any laws, policies or regulations whereby public hospitals can reject any migrant worker accessing healthcare services for emergency cases. As the result, public hospitals are faced with outstanding bills contributed by migrant workers.⁴⁴ Migrant workers are charged beyond their financial capacity, and the coverage scheme provided by the government is insufficient to cover their bills and lower as compared to the one provided for local workers. Arguably, the right to health of migrant workers in Malaysia is not in accordance with the international human rights standards.

CONCLUSION

Health is a fundamental part in the enjoyment of human rights, and it is usually incorporated with the right to life. Various rights such as a person's right to life, security, water, information, education, food and nutrition, development, freedom of movement, freedom of participation, freedom from harmful traditional practices, freedom from violence, torture, slavery, freedom from discrimination and the right to privacy are protected as human rights. Thus, health should be seriously considered as a human right at national level as well as within the international legal framework to ensure that health is protected and is given adequate attention. Health, as a fundamental human right, is considered to the highest attainable standard of living by international legal instruments. 2011 was the year when meaningful initiatives were taken by the Malaysian government to enhance the provision of healthcare for migrant workers in order to meet global standards. It is crucial that the government put in more effort to encourage the civic society to assist and co-operate with all initiatives relating to health issues. The government of Malaysia may be facing burden which might cost the government substantively in managing the adequacy and sufficiency

of the protection of right to health of migrant workers but there are several mechanisms as suggested by international organization on universal social protection as such promoted by the ILO mainly together with the World Bank to protect this vulnerable group.

If the government of Malaysia is really concerned about the right to health of migrant workers in Malaysia, there are several commitments that have been recommended for implementation. In handling this issue, Malaysia should study the possibility of becoming a State Party to the ICRMW. Malaysia should adopt more robust measures in the context of the migrant workers' right to health by reviewing the current system to see in what way it can be enhanced and improved in terms of the treatment and accessibility to healthcare services of migrant workers. Malaysia also needs to ensure that all migrant workers are treated in accordance with international standards regarding the right to health, including conducting and protecting migrant workers in line with international human rights laws. The ICRMW should be the main international standards for the protection of the rights of migrant workers, particularly their right to health.

Currently, the rights of migrant workers in Malaysia are not being sufficiently protected, especially when it comes to dealing with access to healthcare services and compensation for work-related injuries or disability. Migrant workers in Malaysia are also faced with discrimination in the aspect of health. They are not being treated in the way that they are supposed to and deserve to be treated by the government of Malaysia as the State of employment. In principal, although Malaysia is not a signatory to the ICCPR, ICESCR, ICRMW, and all those related instruments that will be legally binding on Malaysia, the Malaysian government should not compromise when it comes to the fundamental issue of human rights as such. From the perspective of the obligations of the State, the sovereignty of a State is always respected. In the meantime, at the international level, the law generally recognizes that a State cannot always deal with migrant workers on its own as what it intends to do might be in violation of human rights, since the right to health is a fundamental part of the enjoyment of human rights.

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NOTES

¹ Article 28, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICRMW).

² Malaysia has yet to ratify this convention. The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.

- ³ The Universal Declaration on the Human Genome and Human Rights of 1997.
- ⁴ Muhamad Sayuti bin Hassan @ Yahya & Rohaida Nordin, 2017, 'Sejarah Hak-hak Penentuan penentuan Kendiri-kendiri Orang-orang Asal di Bawah Undang-undang Antarabangsa,' (2017) Isu Khas *JUUM* 1-8. Fakulti Undang-Undang Universiti Kebangsaan Malaysia.
- ⁵ Article 12, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.
- ⁶ Article 11, European Social Charter 1961.
- ⁷ Article XI, American Declaration of the Rights and Duties of Man, 1948.
- ⁸ Articles 10, 11, 16, 28, 43, 45, 70 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICRMW).
- ⁹ Articles 9, 13, 14, 17, 27, 30, 39, 44 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICRMW).
- ¹⁰ ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007.
- ¹¹ Article 5 of 2007 ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers.
- ¹² Article 5 of 2007 ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers.
- ¹³ Article 5 of 2007 ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers.
- ¹⁴ Article 8 of 2007 ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers.
- ¹⁵ ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007.
- ¹⁶ List of ILO Conventions ratified by Malaysia: C029 Forced Labour Convention, 1930 (No. 29); C098 Right to Organise and Collective Bargaining Convention, 1949 (No. 98); C100 Equal Remuneration Convention, 1951 (No. 100); C105 Abolition of Forced Labour Convention, 1957 (No. 105); C138 Minimum Age Convention, 1973 (No. 138); C182 Worst Forms of Child Labour Convention, 1999 (No. 182); C081 Labour Inspection Convention, 1947 (No. 81); C144 Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); C050 Recruiting of Indigenous Workers Convention, 1936 (No. 50); C064 Contracts of Employment (Indigenous Workers) Convention, 1939 (No. 64); C065 Penal Sanctions (Indigenous Workers) Convention, 1939 (No. 65); C088 Employment Service Convention, 1948 (No. 88); C095 Protection of Wages Convention, 1949 (No. 95); C119 Guarding of Machinery Convention, 1963 (No. 119); C123 Minimum Age (Underground Work) Convention, 1965 (No. 123); C131 Minimum Wage Fixing Convention, 1970 (No. 131); MLC, 2006 - Maritime Labour Convention, 2006 (MLC, 2006); C187 Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).
- ¹⁷ Article 5, Federal Constitution of Malaysia.
- ¹⁸ Article 125, Federal Constitution of Malaysia.
- ¹⁹ *Surat Pekeliling Ketua Setiausaha Bilangan 8*, Ministry of HealthOH, 2015.
- ²⁰ See summary of the Working Group on Arbitrary Detention (WGAD) 2011 Rreport, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/102/76/PDF/G1110276.pdf?OpenElement>, accessed date 19th January 2018.
- ²¹ Report of the Working Group on Arbitrary Detention, 2011, The Office of the United Nations High Commissioner for Human Rights (OHCHR).
- ²² *Economic Transformation Program Report 2014*, http://etp.pemandu.gov.my/annualreport2014/upload/ETP2014_ENG_full_version.pdf (accessed date 19th January 2018.) See also <https://www.spikpa.com.my/Home/SenaraiIns.aspx> 19th January 2018.
- ²³ Skim Perlindungan Insurans Kesihatan 2011, Ministry of Health, <http://finance.moh.gov.my/v3/index.php/spikpa> (accessed date 19th January 2018).
- ²⁴ Skim Perlindungan Insurans Kesihatan (SPKIPA) 2011.
- ²⁵ H. Chua & H. J. Cheah, J. Financing universal coverage in Malaysia: a case study. *BMC Public Health*, 2012; 12: S7.
- ²⁶ C. Hector C. & P. Somwong, P. Employers must pay all medical cost of workers especially when it is a work-related accident or an occupational disease. *Shan Herald*, 2014. Available from: http://www.shanland.org/index.php?option=com_content&view=article&id=3421:employers-must-pay-all-medical-cost-of-workers-especially-when-it-is-a-work-related-accident-or-an-occupational-disease&catid=102:mailbox&Itemid=279 (accessed date 17 August 2017.)
- ²⁷ See Part III of Employees' Social Security Act 1969.
- ²⁸ Pertubuhan Keselamatan Sosial Malaysia, 2018. Perintah Pekerja Asing dikeluarkan daripada SOCSO. <https://www.perkeso.gov.my/index.php/ms/theme/profil-perkeso#tahun-1993> (accessed date 19th January 2018.)
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- ³¹ Malaysian Employers Federation (MEF), 2014, http://www.mef.org.my/Attachments/MEFReport_PGERPERFWM.pdf (accessed date 19th January 2018.)
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- ³³ Interview with Mr Karupiah Somasundram, Malaysian Trade Union Congress, MTUC, 11th January 2016, Subang Jaya.
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- ³⁵ Interview with Mr Karupiah Somasundram, Malaysian Trade Union Congress, MTUC, 11th January 2016, Subang Jaya.
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